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Supreme Court of the United States

October Term, 1942

Docket No. 511

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

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Dated this 15th day of September, 1942.

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

Pursuant to Rule 12, paragraph 3, and Rule 7, paragraphs 3 and 4, the appellees have made and filed their motion herein that the decree of the District Court of the United States for the District of Minnesota, Third Division, be affirmed (Rec., Doc. No. 19), and the appellant hereby answers said Motion, and sets forth the following reasons why the motion to affirm should be denied.

STATEMENT OF FACTS.

The appellant introduced good and sufficient evidence before the Interstate Commerce Commission to establish the facts that he started in the transfer and transportation business by motor vehicle as a general contract carrier in 1931, *holding himself* out to the general public as such, and that he also operated as an irregular carrier of general commodities, having obtained a permit from the State of Wisconsin for movements of *general commodities* between Chicago and St. Paul and Minneapolis, and soliciting business from whomsoever he could get it, in both of his carrier operations (Rec., Doc. No. 5 with Exhibits; and Doc. No. 7, Lower Court's Primary Findings, p. 3).

Forsaking neither his *general* contract carrier status nor his status as an irregular carrier of general commodities, but in pursuance thereof, he entered into a contract, in November, 1934, with Swift & Company, a general food products concern, and with its subsidiaries and affiliates, for the movement of any and all merchandise for that company and its subsidiaries and affiliates in the trade territory of the South St. Paul plant, which required him to operate, and in which he did operate, prior to the critical statutory date, July 1, 1935, *between* points and places in the States of Minnesota, Wisconsin, Iowa and Illinois, and the Cities of Grand Forks and Fargo, North Dakota. His was in all respects a *territorial* operation. At the same time, he carried on his movements of *general commodities* between Chicago and the Twin Cities area. Proper licenses and permits were issued to him by various states for this dual operation which at that time had not been held un-

authorized by the subsequent Motor Carrier Act that, by Sec. 210, makes a dual operation lawful only for good cause shown (Rec., Doc. No. 5; and Doc. No. 7, Lower Court's Primary Findings, p. 3).

A contract, similar to the Swift & Company contract, was entered into on February 6, 1935, with Libby, McNeill & Libby of Chicago and Blue Island, Illinois, a general food products concern specializing in canned goods, and with that company's subsidiaries and affiliates.

Plaintiff-appellant was under contract obligation to transport for Swift & Company and Libby, McNeill & Libby anywhere in this entire territory, and in connection with these movements, but also independent of those contracts, he transported general commodities between Chicago, Illinois and the Twin Cities area (Rec., Doc. No. 5; and Doc. No. 7, Lower Court's Primary Findings, p. 3).

On June 1, 1935, plaintiff again, under his *general* contract carrier status, entered into a similar contract with Kraft-Phenix Cheese Company, now known as Kraft Cheese Company, also a general food products concern, for the transportation of its products generally westbound out of Green Bay and Plymouth, Wisconsin, and north-bound out of Freeport and Chicago, Illinois (Rec., Doc. No. 7, Lower Court's Primary Findings, pp. 16-17).

He added materially to his equipment and personnel at great expense in order to carry out this contract, and was obligated and stood ready at all times from June 1, 1935, to transport the Kraft Cheese Company products when and wherever directed by that Company, in and within his territorial operation, while, at the same time, he continued to carry on his movements of general commodities between

Chicago and the Twin Cities area in connection with these movements but independent of that contract (Rec., Doc. No. 5, 5a and 5b).

The Kraft Company, after the execution of the contract, undertook to make a new arrangement in its method of distribution which caused an interruption of service for them beyond the control of the carrier until after July 1, 1935. Insofar as the carrier was concerned there was no simulated service, but an actual contractual obligation to serve. The initial service to the shipper was the execution of the contract itself.

Since these operations, appellant, with the knowledge and sanction of the Commission with whom his contracts and schedules were appropriately filed, has entered into approximately 120 contracts with shippers, 83 of which contracts are still existent (Rec., Doc. No. 5; and Doc. No. 7, Lower Court's Primary Findings, p. 3). All these contracts appellant believes to have been and to be within the scope of his general contract carrier status, and his status as an irregular carrier of general commodities, and to be within the scope of his operation and have the same validity, as his contracts with Swift & Company, Libby, McNeill & Libby and Kraft Cheese Company, and their subsidiaries and affiliates. He has, at large expense, increased his equipment and facilities for successful operation to 22 tractors, 22 trailers and 7 straight trucks, and has acquired considerable office equipment and well-equipped terminals and warehouses. He has engaged the services of many competent drivers and mechanics, having now approximately 80 full-time employees. He was the first operator to establish relay runs between the Twin Cities and Chicago.

has transported in the past few years, and is transporting approximately 100 million pounds a year within his "grandfather" territory. All these operations have been, *continuous* operations for close to 8 years (Rec., Doc. No. 5, 5a and 5b), conducted in good faith, many of them prior to the "grandfather" statutory date, with full knowledge and sanction of the Commission, and they all are within the natural, normal and logical scope of his business as a general contract carrier for which he held himself out to the public, and as an irregular carrier of general commodities between Chicago, Illinois, and the Twin Cities area, for which he also held himself out lawfully to the public and actively solicited the public prior to, on and subsequent to the crucial "grandfather" date. All these operations are squarely within the definition of a contract carrier and the *business* of the carrier and the *scope* thereof" which Congress has set forth in the Motor Carrier Act, Sec. 203 (a) (15) and Sec. 209 (b).

Appellant was also a member of, and registered under, the N. R. A. and the Code of Fair Competition for the trucking industry prior to July 1, 1935, which registration, under Sec. 209 (a), is by the Act itself held as evidence of his bona fide "grandfather" operation.

The form of applications prepared by the Interstate Commerce Commission for "grandfather" permits or certificates required the applicant to state his main or principal operation, and appellant did state on his said application his main or principal operation to be that for Swift & Company, Libby, McNeill & Libby and Plankinton Packing Company, Milwaukee, Wisconsin, *and others*, within his "grandfather" territory, setting forth that the products he transported

consisted of *commodities generally, meats and packing house products specially* (Rec., Doc. No. 5a). This operation, however, by no means encompassed all of appellant's bona fide "grandfather" operation. This was clearly established by undisputed evidence at the hearing on his application and was admitted in the Findings of the Commission itself (Rec., Doc. No. 2, Exhibit A, Sheets 9, 10 and 11, and Doc. No. 5, Exhibits Nos 4 and 6).

His application was in alternative form, either for a permit as a general contract carrier by motor vehicle, or as a common carrier by motor vehicle, or both in the discretion of the Commission for good cause shown under Section 210 of the Motor Carrier Act.

The Commission, in its Findings, admitted, and the exhibits in evidence show, that the appellant, within the "grandfather" period, transported *a wide range of commodities*, including many food products other than canned goods, dairy products, fresh meats and packing house products and supplies, not only over the irregular routes from, to and between points and places within his "grandfather" territory, but over regular routes between Chicago, Illinois, and the Twin Cities area (Rec., Doc. No. 5, 5a and 5b).

He was, as indicated, an irregular carrier of general commodities in addition to a general contract carrier over irregular routes within his "grandfather" territory, and, as stated, was actively soliciting whatever he could get at any of the points and places in his territorial operation.

The Commission, however, in its Findings and Order, and the lower Court, in its affirmance of those Findings and that Order, erroneously restricted the appellant's bona fide "grandfather" operation not only to merely certain types of commodities appellant transported, and to a much more

circumscribed territory than his operation encompassed by limiting his activities *from* certain points and places *to* designated destinations rather than *between* points and places in his territorial operation and thus depriving appellant of a profitable back-haul movement, but also restricted his general contract carrier *business* and the *scope* thereof to certain shippers or class of shippers. In fact, the Commission made a further arbitrary and unwarranted restriction in classifying the comprehensive business of the shippers within the very narrow limits of a major product in which the shippers deal, or of some special branch of their business, holding:

> "*Findings:* We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in Section 203 (a) (1) of the act) who operate *food canneries* or *meat-packing businesses*, (a) of canned foods, *from* Blue Island, Illinois *to* St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing house products and supplies, *from* South St. Paul, *to* Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, *to* La Crosse, Wis., and U. S. Highway 53 *from* La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the *commodities described in (b) from* Chicago *to* St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over *irregular* routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other

respects the application should be denied." (Italics ours.) (Rec., Doc. No. 2, Exhibit A.)

The Commission, in appellant's case, in the face of its Findings that appellant had continuously transported a wide range of commodities other than canned foods, fresh meats, dairy products and packing house products and supplies, not only for food canneries and meat packers but as well for general food products and other concerns, applied to appellant's case the arbitrarily restrictive policy and unwarranted interpretation of the Motor Carrier Act it had adopted in the *Keystone Transportation Contract Carrier Case*, Motor Carrier Cases, 475; 1 Federal Carrier Cases, 374, 389, stating:

> "The question of the form of authority to be granted to contract carriers of *retail food store commodities* was considered at length in Keystone Transp. Co. Contract Carrier Application, 19 M. C. C., 475, and the same problem with respect to defining the business of the applicant and scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications." (Italics ours.) (Rec., Doc. No. 2, Exhibit A, Sheets 11 and 12.)

In that case, after four (4) years of operation under the Act, the Commission, Division 5, assumed the power, for which it had theretofore emphatically held in the *Longshore Contract Carrier Application Case*, 2 M. C. C., 480; 1 Fed. Car. Cases, 671, there was no warrant whatever in the Act, to restrict the business of the carrier and the scope thereof not only to certain specified commodities and within a specified territory but also to certain shippers or classes

or types of shippers. In appellant's case, the Commission made the restriction of *food store commodities* even far narrower by limiting his entire bona fide "grandfather" operation as a general contract carrier and irregular common carrier to individual contracts with *food canneries* and *meat packing businesses.*

The Commission's Order was issued to limit appellant's operation in accordance with its above Findings.

ARGUMENT.

BASES OF APPELLEES' MOTION TO AFFIRM ARE UNTENABLE.

Appellees' Motion to Affirm is primarily based on the premises that appellant's bona fide "grandfather" operation was similar to the operation of the carriers in the Keystone Transportation Contract Carrier Case (supra), which it was not, rather than to the operation of the carrier in the Longshore case, which it was, and that the Findings and Order of the Commission and the affirmance thereof by the lower Court were, it is alleged, legally based on the Keystone decision. That decision was never reviewed by this Court. Division 5 of the Commission held, in that case, as heretofore stated, it had power, under the Motor Carrier Act, in defining "the business of the contract carrier and the scope thereof" under Sec. 203 (a) (15) and Sec. 209 (b), to limit and restrict that business and scope not only to certain designated territory and certain specified commodities, as it did in the Longshore Case (supra), but also to certain shippers or class of shippers whom the carrier may serve.

By their motion, appellees erroneously seek to maintain that the Commission's decision in the Keystone case is *res adjudicata*, which it is not, and that its application to any other contract carrier case, whether the facts are similar or dissimilar, is not reviewable by any court of competent jurisdiction.

The Motion to Affirm is further based on the premise that the Commission has the power, under the Motor Carrier Act, to refuse to consider and to exclude all testimony as to the carrier's admittedly valid contract with the Kraft-Phenix Cheese Company made prior to July 1, 1935, and the service rendered the Kraft Company pursuant thereto as part of appellant's "grandfather" operation, solely on the ground that the actual transportation of that shipper's products did not commence until after that date.

By their Motion, appellees however completely ignore the clear provisions of Section 209 (a) of the Motor Carrier Act, applicable to appellant's case, which provides that, where the interruption of service was beyond the control of the carrier, that operation shall nevertheless be considered part of his bona fide "grandfather" operation.

Both bases of the Motion to Affirm are irrelevant to appellant's case, and are contrary to law and the unmistakable intent of Congress as disclosed by the clear and plain provisions of the Motor Carrier Act, as amended in 1940, by what is now known as the Interstate Commerce Act, Part II, and certain applicable provisions of Part I.

COMMISSION'S FINDINGS AND ORDER, AND LOWER COURT'S AFFIRMANCE THEREOF ARE BASED ON ERRONEOUS AND UNWARRANTED INTERPRETATION OF LAW.

Longshore Case and Keystone Case Properly Differentiated With Respect to Appellant's "Grandfather" Operation.

Appellant maintains that the District Court of the United States erred in dismissing appellant's petition for the annulment and enjoinder of the Order of the Interstate Commerce Commission, and in thus sustaining that Order which, by restricting and circumscribing appellant's bona fide "grandfather" operation not only to certain principal designated commodities the carrier transported and to a more limited territory than he served, but also to certain shippers or class of shippers, and even to some special branch or major product of the shipper's business, is an abuse and violation of the Commission's power not authorized by the clear provisions and proper interpretation of the Motor Carrier Act.

In defining in the permit "the business of the contract carrier covered thereby and the scope thereof" under Sec. 203 (a) (15) and Sec. 209 (b), which two Sections are closely and inseparably inter-related and must be considered jointly, the Commission's power of restriction is confined, by the provisions of the Act itself, to restricting that *business* and its *scope* to the commodities transported or to be transported, and to the territory served, or to be served, over regular or irregular routes or both. There is certainly no warrant whatever in the Act, regulatory or otherwise, empowering the Commission, in defining the business

of the carrier and the scope thereof, to narrowly designate the business of the shipper served to some major product the shipper deals in, or to some special branch of his business, in the face of the fact that appellant's contracts with shippers under his bona fide "grandfather" operation called for transportation of *all* their products as directed and that, admittedly, he transported a *wide range of commodities* other than the major products of the shippers.

These unwarranted restrictions, especially the restriction of appellant's "grandfather" operation to certain shippers or class or type of shippers will materially and unlawfully change and pulverize both appellant's contract carrier status and his status as an irregular carrier of general commodities, and will materially and unlawfully restrict appellant's business and his prior opportunities beyond the clear requirements of the statute.

For more than four years after the passage of the Act, the Interstate Commerce Commission itself, in its application and enforcement of the Act, repeatedly held, "after much study" as Commissioner Lee stated in his dissenting opinion in the Keystone case, that, under the Motor Carrier Act, it was "without authority to attach any terms, conditions or limitations to a permit of a contract carrier which would restrict the right of the carrier to substitute or add contracts within the scope of the permit", and that "the *scope* of the permit as used in this Section (Sec. 209 (b)), relates to the routes or territory which the carrier may serve, and the commodities which it may transport, and *not to the shipper or shippers to whom it may render its service.*" (Italics ours.)

In the Longshore case (supra), the Commission clearly and emphatically enunciated that policy and firmly held to

the interpretation that nowhere in the Act was there any authority or power granted the Commission, in determining the "business of the carrier and the scope thereof", to designate the shipper or shippers, or class of shippers the carrier may serve.

While Sec. 203 (a) (15) of the Act defines the business of the carrier as either a carrier of *passengers* or of *property* and Sec. 209 (a) requires the carrier to designate the route or routes over which he transports or the territory he serves, thus giving warrant for restrictions as to property (commodities) or territory, there is nowhere in the Act any reference to the shipper the carrier may serve and no authority or power given the Commission, either directly or by implication, to circumscribe the carrier's business with a restriction of his operation to certain shippers or types of shippers.

That was therefore the interpretation given the Act by the Commission itself prior to and at the time appellant filed his application in February, 1936, for a "grandfather" permit, and the form of application prescribed by the Commission and the hearing thereon in September, 1938, were in conformity to that interpretation. Literally thousands of "grandfather" applications were determined and permits issued by the Commission to motor carriers based upon that interpretation.

Not until after four year of insistence by the Commission that no other interpretation of the law was warranted, namely, not until October, 1939, did the Commission, in the so-called Keystone case, without any change in the law or amendment having been made, conveniently discard that interpretation, and reverse its former clear and well-estab-

lished policy by holding that "the business of the carrier and the scope thereof" also relates to the particular shippers or class of shippers to whom he may render his service.

The lower Court, predicated its Primary Findings upon a differentiation of the Longshore case from the Keystone case and upon an erroneous application of the decision in the latter to appellant's case. The Court set forth that, in the former, which was an application to transport steel products, the limitation as to the shippers would have prevented the addition or substitution of contracts as provided by law (Sec. 209 (b)), while, in the later, in which a very large number of applications by private carriers to serve chain wholesale and retail grocery and food houses were filed at one and the same time, and where the service of the carrier had been entirely integrated with the service of the shipper, the Commission found it necessary to designate the class of shippers that these carriers may serve, for the reason that merely naming the commodities would impose no limitation whatever (Rec., Doc. No. 7, pp. 1244).

However, irrespective of the question whether or not such differentiation as a basis of restricting a carrier's operation has any warrant in the law, the restrictions by the Commission of appellant's bona fide "grandfather" operation can find no legal or logical basis in such differentiation. On the contrary, such differentiation in appellant's case would bring his case in line with the Longshore case and within the negation by the Commission itself of the power to make any restrictions in his permit as to shippers or class of shippers.

The operation of the carrier in the Longshore case was confined as the Commission held, to steel, and steel prod-

nets, and materials and supplies used in the operation and maintenance of plants producing steel and steel products. Appellant's operation, the Commission held, was confined to canned goods, dairy products, fresh meats and packing house products and supplies used in the operation and maintenance of food canneries and meat-packing businesses. If, in the former case, a limitation as to shippers "would have prevented the addition or substitution of contracts as provided by law (Sec. 209 (b))", by what reason, or logic, or on what legalistic grounds can it be held that, in appellant's case, a limitation as to shippers is warranted and that such limitation "would *not* prevent the addition or substitution of contracts as provided by the same law". The two cases are analogous. There is no analogy between appellant's case and the Keystone case.

The Keystone case presented a unique and entirely different situation than is presented in appellant's case. Appellant was in the general trucking business prior to the "grandfather" date as both a contract carrier and common carrier. He was an independent, individual operator who himself built up his business, owned and operated his own equipment and had constantly at great expense added to it and to his facilities and personnel as the development of his business and the demands of the public required. He held an operating permit as an irregular carrier of general commodities from the State of Wisconsin. A permit or certificate from other states for that operation within the territorial area was not then required.

The facts in the Longshore case were set forth in the findings of the Commission in that case as follows:

"Applicant owns two tractors and two 18-foot trailers of ten and twelve tons capacity respectively. He

has operated at a profit in this service, is financially able to carry on his operations, follows good operating practices, and holds a permit from the State of Ohio."

In that case, the applicant had even indicated a willingness to accept a limitation to transportation for a certain shipper, the American Rolling Mill Company, but the Commission insisted it had no authority, under Section 209 (b) or any other provision of the Act, to limit the carrier to a certain shipper or a certain class of shippers.

No such willingness to accept a limitation as to the shipper was indicated in appellant's case.

In the Keystone Case, the Commission's findings as to the business or "grandfather" operations of the carriers who served the American Stores Company was as follows:

"The applications are sponsored by the American Stores Company, a chain grocery store operator. Until recently all the applicants served the company as bona fide, *full-time employees, in the capacity of truck drivers of company-owned equipment.* The company sells grocery and food products in the territory described in appendix B, * * *. In this territory it owns and operates approximately 2,700 retail food stores. * * *

"Until recently the company owned and operated its own motor trucks as a private carrier. For several reasons, including labor troubles and keen competition, the continuation by it of private operation of trucks has become increasingly difficult. It is now the company's plan and desire to withdraw completely from private operation; to use independent contract motor carrier, and to confine its entire efforts to its real objective, the distribution and sale of food and various other commodities handled by its stores."

As to those carriers in the Keystone case who served the Atlantic and Pacific Tea Company, the Commission found as follows:

> "The A & P Company carrier applications covered by this proceeding are listed in appendix F. They were filed under the 'grandfather' clauses of Section 206 (a) and 209 (a) of the act and represent a portion of approximately 600 applications filed by motor carriers serving the company. All these applications were made with the aid of the company, which, with the passage of the act, offered its assistance to the motor carriers serving it to the extent necessary to bring them in compliance with the act and to preserve their rights thereunder.
>
> "The service performed by contract carriers for the company is similar to that proposed to be rendered by the American Stores Company carriers. Such service is substantially that which would be provided by the company in the event it operated its own vehicles in private carriage, with its principal function the distribution of traffic from warehouses, rail terminals, manufacturing plants, and docks to its individual stores."

The applications in the Keystone Case were presented in a "wholesale" lot. A group of 38 or 39 applicants who were merely truck drivers for and employees of American Stores Company—a *private* carrier—and sought a permit to carry on their employer's former *private* operations. They owned no equipment themselves, had no permits from any state to operate as general truckers, contract carriers, had no independent trucking business, and never held themselves out to the public as motor carriers, or solicited business from the public. They were merely employees of

the single shipper they served. This group of private carriers joined with 83 carriers claiming "grandfather" rights who had merely been *pricate* operators for the Great Atlantic and Pacific Tea Company and sought a permit to serve a chain wholesale and retail grocery and thus continue, under contract carrier protection their former private operation. They sought further to broaden the scope of their "grandfather" operation on the basis of the operation they had carried on for a single shipper prior to the crucial "grandfather" date. They too were not in the general trucking business either as contract carriers or common carriers prior to that crucial date, did not hold themselves out to the public as such and did not openly solicit business outside of their operation for the Atlantic and Pacific Tea Company.

Even in its findings in the Keystone case the Commission expressed some uncertainty as to the legality of the reversal of its former decision in the Longshore case. It said:

> "It does not follow that we are required to include in each and every permit a rigid or technical summary for defining the transportation business covered thereby or the scope thereof."

Appellant maintains that, even in the event it be held that the Commission had some warrant for unduly stretching its regulatory power in the Keystone case by narrowing the scope of the business of those multitudinous operators not only to commodities and territory but to a classification of the shipper by reason of the very large number of applicants who at one and the same time sought permits to transport all the commodities dealt in by chain whole-

sale and retail grocery concerns, one of which represented in one territory alone approximately 2,700 retail food stores, there is no such warrant or authority to apply that policy of restriction in the Keystone case to the operation by appellant whose status and bona fide "grandfather" operation presents an entirely different situation than presented in the Keystone case and whose business is in reality analogous to that disclosed in the Longshore case. The classification of the shipper in appellant's case was therefore an arbitrary, unreasonable and unlawful assumption of power by the Commission.

CLASSIFICATION AND DESIGNATION OF SHIPPER'S BUSINESS, IF WARRANTED, MUST EMBRACE ENTIRE SCOPE OF SHIPPER'S BUSINESS.

In the Keystone case, the Commission broadly and comprehensively classified the shippers, American Stores Company and Great Atlantic and Pacific *Tea* Company as *general food products concerns*. However, in appellant's case, after denial of any and all timely petitions of appellant for review, oral argument or reconsideration to determine, among other things, the general business of the shippers he served, namely Swift & Company and Libby, McNeill & Libby, and Kraft Cheese Company, who are all general food products concerns, and the subsidiaries and affiliates of these companies, and, without making specific findings as to what standard the Commission adopted for determination of the classification of these shippers, the Commission unreasonably, arbitrarily and unlawfully defined the shippers by the narrow designation of a special

branch or major product of their business, designating Swift & Company as merely a "meat-packing business", and Libby, McNeill & Libby as merely a "food cannery", and thus limited appellant's permit to persons who operate food canneries or meat packing houses. Thus the Commission destroyed the parity between appellant's future operation and his prior bona fide operation which the statute was designed to preserve.

Swift & Company, by its very Articles of Incorporation, in effect since 1917, and which were in evidence in the lower Court as plaintiff's Exhibit F, is a general food products concern (Rec., Doc. No. 6, p. 1), and has, since that time, continuously operated as such. In fact, those Articles list as the first object for which the company was formed: "to manufacture, buy, sell and deal in and with *any and all foods*. Its second object is stated to be "to manufacture, buy, sell and deal in and with any and all materials, articles, commodities and things which may be manufactured and converted into *foods or the by-products thereof*." The slaughtering of animals and conversion thereof into meats is only the third object stated. So also Libby, McNeill & Libby and Kraft Cheese Company, are general food products concerns, even though, as to the latter concern, the word "cheese" forms part of the firm name, just as the word "tea" forms part of the firm name of the Great Atlantic & Pacific Tea Company.

Congress certainly never intended to give the Commission unlimited power, in determining the "business of the contract carrier and the scope thereof" to restrict that business and scope to such narrow, arbitrary and unreasonable limits as are contrary to and inconsistent with the

comprehensive definition of the *business* of the carrier given by Congress itself in the Act. The clear provisions of the Act as to the designation of the business of the carrier and the scope thereof, especially insofar as "grandfather" operations are concerned, positively negates such power in the Commission, and, as stated, until the Keystone case applications came before the Commission, that body itself firmly held that view.

There has been no change or amendment in the law warranting a different interpretation. In fact, the 1940 Amendment of the Act strongly supports the interpretation given the Act in the Longshore case. The original Act, Sec. 203 (a) defined the business of a "contract carrier by motor vehicle" by designating such carrier as any person which, under *special* and individual contracts, or agreements, engages in the transportation of *passengers* or *property* in interstate or foreign commerce for compensation. The Amendment of 1940, in Sec. 203 (a) of the Act omits the word "*special*" with reference to the carriers' contracts and thus clearly re-affirmed the interpretation it intended in the first place and which the Commission had given the Act before the Keystone case, namely, that a contract carrier shall be considered to be in bona fide operation under individual contracts without *special* or *specialized* service to particular shippers. By that intentional omission in the Amendment of the Act, Congress gave its disapproval of the Commission's restrictive interpretation of the Act in the Keystone case, and, indicated clearly again that it withheld from the Commission the power to designate the business of the carrier and the scope thereof by predicating it upon *special* contracts with or *specialized* service for certain shippers or class of shippers. Congress also, by that

omission of the word "special" sought to wipe out and did wipe out the preference in business or protection the Commission contended, in the Keystone case, the common carriers should have.

Moreover, the Commission in its order and the U. S. District Court in its decision erred in failing to set forth or make any material reference to the ten or more subsidiaries and affiliates of Swift and Company and of Libby, McNeill & Libby, some of whom, such as Derby Foods, Inc., are general food products concerns which appellant, during the "grandfather" period, was not only obligated by contract to serve but did actually serve. Many of those subsidiaries and affiliates are in no sense "meat packing businesses" or "food canneries" or "cheese processing businesses", either in their primary business or incidental business. If a classification of the shippers be held to be authorized in the law and to be a necessary part of the specification of the business of the contract carrier and the scope thereof, then under the very provisions of appellant's contracts with and transportation for shippers, prior, on and subsequent to July 1, 1935, the business of all these subsidiaries and affiliates should have been also separately defined and classified and included in the grant of authority to appellant by the Commission. Otherwise, the Commission could resort to even a more drastic interpretation of the Act by further restricting appellant's business as a contract carrier and the scope thereof to an operation for only meat-packing businesses or food canneries *who have ten or more subsidiaries*, or who have *no subsidiaries*, and thus practically confine his "grandfather" operation to an operation for Swift & Company only, or to an operation

for some minor enterprise. To restrict a carrier's business to certain shippers or types of shippers, and especially to classify the business of shippers, in that connection, within the most narrow bounds by basing that classification on merely a major product in which the shipper deals, or on some special branch of his business is not only not warranted in law, but is utterly repugnant to the American way of living and doing business, destroys individual initiative and enterprise, and subjects such carrier to the will of the shippers in his contractual business relations with them in that he must deal with these particular shippers or have no business at all.

As hereinbefore indicated, the Motor Carrier Act, Section 203 (a) (15), specifically defines the *business* of the motor carrier as either a carrier of *passengers* or a carrier of *property*, and nowhere in the Act is that business defined as an operation for certain shippers or class of shippers.

Likewise, in the law, reference is made to both regular and irregular route carriers, and to the territory in which the carrier has operated or is to operate. (Secs. 203 (a) and 209 (a).)

The word "scope", as used in the Act, especially in Section 209 (b) of the Act, is the only word upon which the Commission can predicate its findings as to the *extent* of the carrier's business, which extent must be considered only in relation to the Congressional definition of the carrier's business as either a carrier of passengers or a carrier of property, and the territory he serves as either a regular or irregular route carrier.

There is nowhere in the law any authority or power given the Commission to go beyond a limitation as to pas-

sengers, property or territory of the carrier, or as to whether he is a regular-route carrier, or irregular route carrier, in his operation under his "grandfather" status.

The lower Court erred in holding that the scope of the business of the carrier has reference to his *individual operations*, stating:

> "Manifestly the intention was to vest in the Commission broad powers to determine and specify in the permit, by the use of adequate language to do so, the extent of the *operations* in which the Carrier might engage. The word 'scope' is a comprehensive term as used in the Act and is for the purpose of enabling the Commission to prescribe a limited or an extensive range of *operations* in accordance with the rights of the carrier as determined by the character and extent or the service furnished on July 1, 1935." (Italics ours.) (Rec., Doc. No. 7, p. 11.)

There is nothing in the language of the Act to warrant such interpretation. The language of the Act is plain and simple as the lower court itself has said (Rec., Doc. No. 7, p. 11). It is not subject to the interpretation given it by the lower court. The language clearly and simply sets forth that the Commission shall specify in the permit the *business* of the carrier and the scope *thereof*, and not his individual operations and their scope.

If there be any ambiguity in the law, Section 209 (b), reference in clarifying that ambiguity and disclosing the true intention of Congress is had to discussions and hearings by Congress on the Bill before its passage.

When the Bill, which later became the *Motor Carrier Act, 1935*, was placed before the Senate Committee on Interstate and Foreign Commerce by Commissioner Eastman,

who was then Federal Coordinator of Transportation, Section 209 (b) provided that:

> "The Commission shall specify in the permit the *operations* covered thereby and the scope thereof * * *"

The Senate Committee eliminated the word "operations" and substituted for it the "*business* of the contract carrier."

This change made by the Senate Committee shows clearly that Congress did not intend that the Commission shall specify, in the permits of contract carriers, the individual operations conducted on the "grandfather" date, but rather that the Commission shall specify, in the permit, a *broad, comprehensive statement* of the *business* in which the carrier was engaged, under the classification set forth by Congress itself, as either a carrier of passengers or carrier of property, and as a regular or irregular route carrier.

If any doubt exists that this was the true intent of Congress in making the change, the following statement made by Senator Wheeler on the floor of the Senate in explanation of this change certainly clarifies that doubt.

> ". . . This section (referring to Section 209) has been changed in lines 19-22, page 27, to make clear that the bill applies to the *business* of contract carriers and not merely *operations* under the individual contracts." 79 Cong. Rec. 5654. (Italics ours.)

If Congress had intended to restrict the business of the carrier to his individual operations and related operations, it would have used a restrictive word such as "limits" or "limitations" thereof. Congress, however, instead used the word "scope". The word "scope" in its natural and usual meaning and as defined by Webster is certainly not a re-

strictive term. It is an all-comprehensive term, and means "amplitude of opportunity"; "free course or vent"; "range"; "length"; "extent"; "sweep". As used in the Motor Carrier Act "The business of the carrier and the scope thereof," it is a relative term. The Commission is to state in the permit of the carrier, the "scope of the commodities" carried, and the "scope of the territory" covered. If it now be held, as was held by the Commission in the Keystone case, that the classification of the shipper also comes within the meaning of the word "scope", though no amendment of the law has directly or by implication made that inclusion, then also, where appellant's contract called for transportation of any and all of the shipper's products as directed, the *entire scope* of the shipper's business, the "extent" thereof, the "sweep" thereof, is to be stated, and not his business given a very restrictive classification by simply designating, as the shipper's business, a major product he deals in, or a special branch of his business. Such a narrow classification of the business of the shipper circumscribes the carrier's "grandfather" rights to a mere semblance of his bona fide "grandfather" operation.

THE MOTOR CARRIER ACT CONTEMPLATES EQUAL PROTECTION FOR BOTH CONTRACT CARRIERS AND COMMON CARRIERS.

Congress made special liberal provisions in Secs. 209 (a) and (b) with respect to the rights of contract carriers as it considered the securing of individual contracts an equalizing restriction in itself, and in section 209 (b) therefore set forth that contract carriers in new or extended applications coming within the national transportation policy

and the provisions of the Motor Carrier Act need show only "consistency with public interest" rather than the more stringent requirements of "public convenience and necessity" imposed on common carriers; and in section 218 of the Act, instead of providing for the same schedule of rates for both contract and common carriers, Congress merely provided that the contract carriers shall be given no preference in the rates they may charge.

The Commission in Keystone case, though limiting the business of the carriers to certain class of shippers, gave to these operators more than they asked for, by granting them authority to operate for *all food stores* in their territory, and in announcing this new policy,—a reversal of its former interpretations of its power,—the Commission set forth, in effect, that a classification of the shipper the carriers in the Keystone case may serve was made necessary *for the special protection of common carriers*—a protection which the law never contemplated to be paramount to the protection of the contract carrier.

In *U. S. et al. v. N. E. Rosenblum Truck Lines, Inc.*, 62 Sup. Ct. Rep. 445, which was analogous to the Keystone case in that the carriers were not independent operators serving the public, but in effect private carriers who only served certain common carriers, the Court held:

> "The Act clearly contemplates that contract and common carriers will offer *competing* types of service." (Italics ours.)

In the application of *Powell Brothers Truck Lines*, 9 M. C. C. 785, the Commission laid down the doctrine that "common carriers * * * cannot operate economically and efficiently if other carriers are permitted to invade

such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular route service", but the Supreme Court in *U. S. v. Carolina Freight Corp.*, Vol. 62, No. 9, Sup. Ct. Rep. 722, 727-28, specifically repudiated that doctrine, holding:

> "Insofar as that view established a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators, it is erroneous as a matter of law * * * We conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers."

And in *C. M. St. P. & P. R. R. Co. v. U. S.*, 33 Fed. 2nd 582, affirmed in 282 U. S. 314, it was held that the Commission operates in a field limited by constitutional rights and legislative requirements and it has only such power as has been expressly delegated or is reasonably necessary to effectuate the delegated power, and it may not substitute for the standards of the Act standards of its own.

The District Court, therefore, erred in supporting this unwarranted policy of special protection of the common carrier by discriminations against the contract carrier that the Commission has applied to appellant's case.

THE KRAFT CHEESE COMPANY CONTRACT IS PART OF APPELLANT'S BONA FIDE "GRANDFATHER" OPERATION

The Commission refused to consider the Kraft Cheese Company contract service part of appellant's bona fide "grandfather" operation, and, over the objections and excep-

tions of appellant, excluded all testimony with reference thereto, on the ground that actual transportation of the company's products did not commence until after July 1, 1935. The lower Court erred in affirming that refusal and exclusion (Rec., Doc. No. 7, p. 16).

We maintain that appellant's case differs materially from those cases heretofore brought before this Court in which a mere potential or simulated service was held to be properly excluded from a bona fide "grandfather" operation.

In *Alton Railroad Co. v. United States*, 62 Sup. Ct., Rep., 132, the court, in connection with its dictum, in a common carrier case, that "'territory' is not a word of art, and that the characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial scope of the operation which may be authorized under the grandfather clause", held that "while the test of a 'bona fide operation' within a specified territory includes 'actual rather than potential or simulated service', it does not necessarily restrict future operation to the precise points or area to be served."

In *U. S. v. Maher*, 307 U. S. 148, there was no contract for a *regular* route service. The operation was held not to be identified with the carrier's bona fide "grandfather" operation as no regular route over which he sought transportation was in existence on June 1, 1935.

In *McDonald v. Thompson, et al.*, 305 U. S. 263, 266, the Commission denied the "grandfather" right of applicant to haul over Texas highways, not because there was no actual operation prior to July 1, 1935, but because the State of Texas had taken away the carrier's right to the proposed operations on the grounds that these operations subjected

the highways to excessive burden and endangered and interfered with ordinary use by the public.

Gregg Cartage & Storage Co. v. United States, 62 Sup. Ct. Rep., 932, involved a very different issue than that presented in appellant's case. The Court merely decided in that case that "the bankruptcy of the motor carrier is an interruption of service within the control of the carrier."

In appellant's case, there was on and prior to July 1, 1935, an actual admittedly valid contract existing between the appellant and the shipper which contract was made in pursuance of appellant's general trucking business, both as a general contract carrier and as an irregular carrier of general commodities. The execution of that contract was in itself the initial *service* to the shipper, as it was negotiated only after considerations and settlements as to rates, necessary equipment and increased personnel to be furnished and territory to be covered. Appellant did add materially to his equipment and personnel, at great expense, for the purpose of carrying out the contract with the Kraft Cheese Company, and was obligated and stood ready at all times from the execution of the contract to transport the Kraft Cheese Company's products when and wherever directed by that company in and within his territorial operation. The Kraft Cheese Company itself, not the appellant as carrier, undertook, after the execution of the contract, to make a new arrangement in its method of distribution which caused an interruption of *service* beyond the control of the carrier-appellant until after July 1, 1935. Under Sec. 209 (a) of the Act, such interruption of service in a "grandfather" operation, does not place that service outside the realm of the carrier's "grandfather" operation, but the service contracted for is to be included in that oper-

ation. The word "service" as used in that Section is a broader term than mere "transportation", "hauling" or the like. It may well include the "assumption of a contractual obligation" and the "preparations" made by the carrier for the benefit of the shipper, to fulfill that obligation. The shipper, by that *service*, is relieved from further negotiations and the execution of a contract with someone else. This interpretation is supported by the decision in *U. S. v. Carolina Freight Carriers Corp.*, 62 Sup. Ct. 722, where the Court held that the Act should be liberally construed and the carrier's prior opportunity should not be restricted beyond the clear requirements of the statute.

The Act itself, Sec. 203 (a) (19), by its very language, in defining the words "services" and "transportation" clearly supports that liberal construction of the word "service" as used in Sec. 209 (b) with reference to "grandfather" operations, and plainly indicate the intent of Congress that it shall be liberally construed. That Section provides:

> "The 'services' and 'transportation' to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with *all facilities* and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce *or in the performance of any service in connection therewith.*"

While the Commission, on August 14, 1942, after the lower Court had rendered its decision in appellant's case, granted appellant authority, under an *extension* application, to carry on his service under the Kraft Cheese Com-

pany contract, by determining that the operation of appellant "under individual contracts with persons who operate *cheese processing businesses* of dairy and similar food products and supplies is lawful, we maintain that that operation for Kraft Cheese Company should have been included in his "grandfather" operation. By not including it in that operation contrary to the provisions of the Act, appellant's "grandfather" rights have been aborted and his opportunity for further extension materially jeopardized by reason of the well-known reluctance and delays by the Commission to grant further extensions and the strong opposition by competitors thereto.

Moreover, by again limiting appellant's operation in that respect to the special shippers or class of shippers the appellant may serve, namely "cheese processing businesses", the same question as the Keystone case presents and the question of the power of the Commission to define the business of the shipper in the most narrow way by reference only to a major product he deals in, or a special branch of his business, are still substantial questions at issue in this case before this Honorable Court, not determinable by Motion to Affirm.

DENIAL OF FAIR HEARING.

Appellant was not a party to the Keystone case, had no notice of it, and, although his own application was filed and a hearing had thereon in conformity to the Commission's own interpretation of the Act at the time, namely, that restrictions in a carrier's permit could relate only to the commodities he transports and the territory he serves,

the Commission decided his case on its later and far more restrictive interpretation of the law and decision in the Keystone case without giving appellant any opportunity, although requested, for oral argument, further hearing or reconsideration or review, in opposition, or for revision or amplification of appellant's application or of his evidence as to the classification of the shipper with respect to his true business and the scope and sweep thereof. All objections and exceptions by appellant were promptly overruled and all petitions flatly denied.

There is nothing in appellant's application, or in the record, to indicate that either the appellant or the shipper were ever given notice or opportunity to show the scope, extent, range or sweep of the shipper's business, and the Commission made no findings upon which it could base a classification of the shipper, and particularly such arbitrary and restrictive classification of the business of the shipper as was made in appellant's case.

The District Court erred in nevertheless concluding in the face of these facts and circumstances and refusals and denials by the Commission, that appellant had a fair hearing, and that the Commission was warranted in deciding appellant's application on the unwarranted and unreasonably restrictive iterpretation of the law set forth in the Keystone case (Rec., Doc. No. 7, p. 18).

ENFORCEMENT OF COMMISSION'S ORDER WILL RESULT IN IRREPARABLE INJURY TO APPELLANT AND MATERIALLY CURTAIL AND IMPAIR HIS "GRANDFATHER" RIGHTS.

The Court erred in holding that appellant has not been injured by the interpretation of the Commission in that he can haul for any meat packing concern or food cannery in his territory (Rec., Doc. No. 7, p. 14). However, from a practical standpoint it means simply that Noble can haul for Swift & Company and Libby, McNeill & Libby because the Commission limited his commodities to fresh meats, canned goods, dairy products and packing house products and supplies for food canneries and meat packing concerns.

Many of the products transported by appellant for Swift & Company and Libby, McNeill & Libby cannot be classed as fresh meats, dairy products, canned goods, or packing house products and supplies. For instance *soap* is one of Swift's & Company's predominant articles, but it is not a packing house product and comes within none of the other commodity classifications. It is an independent product in which Swift & Company deals. The same applies to *peanut butter* and *mayonnaise dressing* and a good many other articles which the appellant has transported in large volume under his bona fide "grandfather" operation.

So also, under the restrictive order of the Commission, he can haul butter for Swift & Company but cannot haul butter for Libby, McNeill & Libby, unless it be canned. He can haul fresh meats and sausages for Swift & Company but he cannot haul either of them for the Peters Sausage Company simply because that company is neither

a food cannery or a meat-packing house. He can haul canned goods for persons who operate merely food canneries, but cannot even haul canned foods for Derby Foods, Inc., a subsidiary for Swift & Company included in the Swift & Company contract, and for whom plaintiff has transported many other food products prior to July 4, 1935.

Such arbitrary and unreasonable restrictions in the Commission's Order would seem to be legally and logically preposterous.

SUBSTANTIAL QUESTIONS INVOLVED NOT DETERMINABLE ON MOTION TO AFFIRM.

The question of the propriety and correctness of the interpretation of the law of unlimited restriction of the carrier's business adopted in the Keystone case, namely that the Commission has the unlimited power in all contract carrier cases under the Motor Carrier Act to restrict the scope of the business of the carrier not only to commodities and territory but as well to a class or classes of shippers, and which policy and interpretation the Commission has applied in appellant's case, has never come before the Supreme Court of the United States, and the instant case is the first case, involving this question, that we believe has ever come before any lower court. It is one of the most substantial questions ever to come before this Honorable Court in the determination of the "grandfather" rights of contract carriers under the Motor Carrier Act. Its proper and final determination is highly important, not only to the carriers but to the public, and will materially affect

the business and welfare of motor carriers in the contract carrier status.

The determination of the corollary question whether the Commission, if it has the power, to classify the shipper and the scope of his business, can predicate that classification and scope upon merely a major product in which the shipper deals, or upon some special branch of the shipper's business, is equally substantial and important.

While appellant's operation for Kraft Cheese Company has recently been held by the Commission to be authorized and lawful, under its granted authority to appellant to transport the products of "cheese processing concerns", the same questions as to the power of the Commission to classify the shipper and the type and extent of that classification remains still a substantial question at issue before this Court.

We maintain also in that connection, that, as under Sec. 209 (a) of the Act, there was an interruption of service in the Kraft Cheese Company operation beyond the control of the carrier, that operation should have been included in appellant's bona fide "grandfather" operation, and not be subjected to determination under an extension application in jeopardy of appellant's rights to further extensions, reluctantly granted by the Commission and which are always subject to strenuous opposition by competitors.

The propriety of the denial by the Commission, and affirmance thereof by the lower Court, of appellant's bona fide "grandfather" operation as an irregular common carrier of general commodities, in the face of the Commission's

and the lower Court's own Findings, to-wit:

> "The plaintiff began a motor transportation business in September, 1934, when he obtained a common carrier permit from the State of Wisconsin for the transportation of general commodities between Chicago, St. Paul and Minneapolis, * * * and under his common carrier permit he transported general commodities (Rec., Doc. No. 5, and Doc. No. 7, Lower Court's Primary Findings, p. 3),

is a very substantial question before this Court.

Moreover, the propriety of the Commission's Order, and the affirmance thereof by the lower Court, limiting appellant's bona fide "grandfather" operation *from* various restricted designated points *to* certain destinations, in the face of the Commission's and the lower Court's own Findings that "he operated *between* points and places in Minnesota, Wisconsin, Iowa and North Dakota" (Rec., Doc. No. 5, and Doc. No. 7, Lower Court Primary Findings, p. 3), is a very substantial question before this Court.

In Alton Railroad Co. v. United States (supra), where authority was granted by the Commission to operate in the designated territory "over irregular routes" through specified states, the Court held that it is plain from the statute that operations need not be restricted to specified routes or between fixed termini.

The question of denial of a fair hearing and due process of law is substantial and not determinable by appellee's Motion to Affirm.

CONCLUSION.

It is here emphatically re-stated that, prior to and on July 1, 1935, appellant was in the general trucking business and held himself out to the public and actively solicited from the public the transportation of any and all commodities as a contract carrier by motor vehicle, under which holding out and solicitation the Swift & Company contract and service and Libby, McNeill & Libby contract and service and the Kraft-Phenix Cheese Company contract and service and the contracts and service with and to the subsidiaries and affiliates of these companies, and others, were negotiated and executed as merely major operations. He was also in the business, under proper state license, of an irregular carrier of general commodities between Chicago, Illinois and the Twin Cities area. He built up his business himself, at great expense, owned his equipment and was an independent operator, and accordingly, made his application in the alternative for either a contract carrier permit or a common carrier certificate, or for both, if good cause be shown.

By the provision in Section 209 (a), namely, "Pending determination of any such application, the continuance of such operation shall be lawful", the law clearly contemplates that a carrier's properly filed "grandfather" application is in effect his permit for the continuance of his operation, until his permit is issued to him. It should be noted that the law refers to his entire general territorial operation (singular), and not to his various, specific and sporadic operations separately. The "scope of his permit", and whatever entire territorial operation—and not merely

some main or major portion thereof—was within the scope of his application was and is lawful until that application is finally determined. As the law provides for judicial review of the Commission's Orders upon which permits or certificates to motor carriers are based, the application cannot be held finally determined until a proper pending judicial review has finally and fairly determined it. It follows, that the carrier's operation after filing his application and pending its final determination is a "bona fide operation" under Sec. 209 (a).

It follows also that, if the entire operation is lawful, pending the final determination of the application, there is a *continuity* of that operation until such determination.

Appellant's operation has been continuous for approximately eight years, and, as was held by the Commission in July, 1940, in *Brown Motor Freight Lines, Inc., Extension Application*, 2 M. C. C. 607, a continued successful operation for even five years raises a strong presumption of a public demand for the continuance of said service.

Such undisputed continuity of service is ample evidence that appellant was in the general trucking business, both as a general contract carrier of *property* and in the business of an irregular carrier of general commodities prior to, on and continuously since July 1, 1935. He could, prior to the effective date, transport property with or without individual contracts with shippers, and he did. His application, while stating his main and major operations as called for, was not like the applications in the Keystone case, one for a permit or certificate, or both, to haul under special contract only certain commodities and for a certain shipper or for special types of shippers, but was predi-

cated upon "grandfather" rights acquired under his territorial operation in his general trucking business.

Section 209 (b) of the Act, relating to "grandfather" rights of a contract carrier, provides with respect to the permit, or with respect to his operation under his pending application before a permit is issued:

> "No terms or conditions or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to its equipment and facilities, within the scope of the permit, *as the development of the business* and *the demands of the public* may require." (Italics ours.)

How can it then be legally held that the addition of all the contracts made and continuous services performed by the appellant within the scope of his bona fide "grandfather" operation as a general trucker, with both a contract and common carrier status, for approximately eight years are unauthorized and unlawful, and that appellant's operation must be restricted to the precise pattern set forth in the findings and order of the Commission and in the decision of the lower Court?

A summary of the United States Supreme Court decisions to date on the "grandfather" rights of carriers leads to the following conclusions:

(1) That the Act, and especially the "grandfather" clause of the Act, is to be liberally construed to achieve that substantial parity between future and prior operations which the statute contemplates, and to preserve the position which the carrier has struggled to obtain in the national transportation system.

(2) That the standards applicable to the determination of the proper authority to be given to a carrier are the same as to regular and irregular route carriers.

(3) That Congress anticipated competing forms of carriage in contract and common carrier service.

(4) That the Commission operates in a field limited by constitutional rights and legislative requirements and it has only such power as has been expressly delegated or is reasonably necessary to effectuate the delegated power, and it may not substitute for the standards of the Act standards of its own.

In *U. S. v. Carolina Freight Carriers Corp.*, (supra), the Court held:

> "It's (the carrier's) *prior opportunity* should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to *preserve* the position which those like appellee have struggled to obtain in our national transportation system." (Italics ours.)

Texas, etc., R. R. Co. v. I. C. C. (N. Y.), 162 U. S. 197; 16 S. Ct. 666; 40 L. Ed. 940.

U. S. v. Pa. R. R., 266 U. S. 191; 45 S. Ct. 43; 69 L. Ed. 243, 243, reversing 295 Fed. 523.

C. M. St. P. & P. R. R. Co. v. U. S. (supra).

U. S. v. N. E. Rosenblum Truck Lines, Inc. (supra).

The Commission and the lower Court further erred, as heretofore indicated, in circumscribing appellant's operation as one *from* certain designated points *to* certain des-

tinations, and thus depriving appellant of any profitable back-haul movement which he carried on under his bona fide "grandfather" operation.

Again, in the case of *U. S. v. Carolina Freight Carriers Corp.*, (supra), the Court held:

> "To appellee such matters involve life and death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall."

A recent case in the U. S. District Court for Northern District of Ohio; *Detroit-Pittsburg Motor Freight v. U. S. & I. C. C.*, Civil action No. 2091, March 25, 1942, was ordered remanded to the Interstate Commerce Commission to reconsider the "grandfather" application and act upon it in accordance with the more liberal principles laid down by the U. S. Supreme Court in the Carolina Freight Carriers case, (supra).

These are substantial questions before this Honorable Court. If this Honorable Court grant the motion to affirm the decision of the lower court, and appellant be denied the opportunity to present his views by further brief and argument, his substantial rights which have been acquired and developed by him through large investments, and years of hard work, will be destroyed, many of his employees will necessarily be thrown out of work, and he will not be able to operate economically or successfully under the Order of the Commission and the decision of the lower Court.

We therefore respectfully submit that the Motion of the appellees should be denied.

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